



**Before the
Federal Trade Commission
Washington, D.C.**

**In the Matter of CAN-SPAM Act Rulemaking
FTC Project No. R411008**

**COMMENTS OF
NetCoalition
June 27, 2005***

NetCoalition respectfully submits the following comments on the Federal Trade Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") regarding certain provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2004's ("CAN-SPAM Act" or "Act") implementation.¹ NetCoalition serves as the public policy voice for some of the world's largest and most innovative Internet companies on the key legislative and administrative proposals affecting the online world.²

The request for additional comments follows the earlier Advanced Notice of Proposed Rulemaking, issued on March 11, 2004. NetCoalition submitted comments to the Commission on April 20, 2004. In addition, NetCoalition submitted comments to the Commission on September 13, 2005 in response to the NPRM to implement the CAN-SPAM Act. This NPRM specifically addresses the areas on which Congress gave the Commission the discretionary authority to issue regulations. NetCoalition appreciates the time and effort the Commission has given to this matter, and submits the following recommendations for further clarification of this complex issue.

I. The Commission Should Clarify the Definition of "Control" To Focus on the Entity Making Final Content Decisions

In the NPRM, the Commission proposes to modify its definition of "sender" to provide that when more than one entity's products or services are advertised in a single email message, a single entity can be identified as the only sender of the message for

* Filed Electronically

¹ Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25426 (Proposed May 12, 2005)(to be codified at 16 C.F.R. pt 316)

² Current membership of NetCoalition includes Ask Jeeves, Bloomberg LP, CNET Networks, Google, Yahoo!, California ISP Association, North Carolina Consortium of ISPs, Ohio ISP Association, Virginia ISP Association, Wyoming ISP Association, and a number of small and local ISPs

purposes of the Act. Accordingly, the Commission proposes that the “sender” of an email is the entity who (i) controls the content of the message; (ii) determines the email addresses to which the message is sent; or (iii) is identified in the “from” line as the sender of the message. The proposed definition does not eliminate the possibility that a message may have more than one sender – if advertisers fail to structure the message to avoid multiple senders, then each sender is obligated to comply with CAN SPAM requirements. Importantly, only one sender can meet any of the criteria to define the sender, or all persons who satisfy the definition will be considered senders under CAN SPAM. While the sender does not need to satisfy all three criteria, as written, no other potential sender may satisfy *any* of them. This qualification is problematic with regards to the first criteria, “controls the content.”

NetCoalition applauds the Commission’s efforts to facilitate emails containing content contributed by multiple senders without placing undue compliance burdens on businesses or endangering consumer privacy. However, the Commission should clarify that “controls the content” should not be interpreted so broadly as to include controlling the design of some element of content included in an email message. Rather, under the proposed criteria, the sender of the email is the entity making *decisions* about the overall content selected for inclusion in an email. For example, if Book Company sends an electronic newsletter or dedicated email that contains an advertisement for Starbucks, designed and submitted to Book Company by Starbucks, Book Company remains the sole sender. The fact that Book Company did not design the look and copy of the advertisement does not mean that Starbucks “controlled the content” of the email. Ultimately, it was Book Company’s decision to reject or include the advertisement in the message, regardless of who crafted the ad itself. Unfortunately, as written, the three pronged test could be misinterpreted to mean that the entity that published the email could not be considered the designated sender – thus managing the list of subscriber opt-outs – because others “control” the look and content of advertisements contained in the email, voiding the single sender option by having multiple entities that meet at least one of the three criteria.

When considering the process for placement of an advertisement, the proposed clarification makes inherent sense. The company issuing an electronic newsletter, or email that contains advertisements, will have influence over the composition of an advertisement, even where they do not make direct design and content decisions. This influence comes from the ability to determine if the advertisement will be included in the message at all, and which other advertisements should be included. A company publishing an electronic newsletter will always review proposed advertisements prior to distribution to determine that the advertisements are appropriate for the publication and its audience. For example, an electronic newsletter directed to children might reject an advertisement for adult-oriented services such as mortgages, loans or auto sales. While the publisher may not have the authority to change the copy of the ad, it still determines whether the advertisement will be included as content. Where an ad is rejected, the advertiser may modify the ad or submit an alternative more suitable to the publication, based on the preferences of the publisher. In this way, by making inclusion decisions, the publisher does have influence and control over the content.

Therefore, to allow for designation of a single sender in the very common scenario discussed above, the Commission should clarify that “control” is not editorial control over the design or content of material, but control over the decisions of what content – regardless of who created it – will be distributed in the email. This definition properly focuses on the *distribution* of the advertisement rather than actual words of the text, which comports with the basic intent of the CAN SPAM Act.

In the alternative, the Commission can void the position that only one sender can meet the “controls the content” criteria or all persons who satisfy the definition will be considered senders under the Act, while maintaining the position with regard to the other two prongs. This position recognizes that many entities variously have control over the content of advertisements in online publications delivered by email, and as such, that factor is not an appropriate way to determine the exclusivity of a designated sender. The other two criteria are adequate to narrow the field of potential designated senders. However, NetCoalition believes a more precise solution that attains the goals of the Act is to clarify the definition of “controls the content” to assign “control” to the entity making the decisions of what content will be included in an email.

II. The Commission Should Retain the 10 Day Opt-Out Timetable

The Act prohibits senders, or persons acting on their behalf, from initiating the transmission of a commercial email message to a recipient more than ten business days after senders have received a recipient’s opt-out request. The Commission, exercising its discretion granted in the Act by Congress, proposes shortening the timeframe to three business days. The Commission’s position is that current technology allows for processing such opt-out requests instantaneously, and thus the current ten business day time frame is not necessary. NetCoalition respectfully disputes the Commission’s position. Given the role of NetCoalition members in the marketplace, we write to offer the Commission an understanding of the actual operation of commercial email distribution and maintenance of opt-out lists.

While NetCoalition is committed to respecting consumer requests not to receive commercial email, we strongly oppose this proposal. It is virtually impossible to effectively comply with opt-out requests in such a short time frame. First, and most importantly, while it is true in many instances that technical/electronic compliance with an opt-out request could be handled immediately, this fails to take into account the multiple parties involved in the sending of a commercial email. The Act itself creates the need for the conveyance of opt-out lists within and among multiple entities. A single “unsubscribe” click by a consumer may result in the need to scrub lists in multiple divisions within a single company, across a wide geographic spread, as well as communication of the unsubscribe to various email vendors and advertising partners external to the company itself. Three days is simply not enough time for an entity to scrub its internal opt-out lists and those opt-out lists held by their advertising partners, especially when it concerns large, multi-division organizations with highly distributed operations.

Second, companies generally begin preparations for an email offer weeks in advance. The list of email addresses for the message may take significant time to “build” – for example, if it is drawn from a site with multiple areas where a user may choose to “opt-in” to receive offers. Once that list is built for the purposes of the mailing, it must then be scrubbed for users who have opted-out from receiving certain types of mailings, perhaps in conflict with an “opt-in.” The mailing plan must also go through a sales system designed to comply with the accounting and attribution rules required by the Sarbanes-Oxley legislation. This process cannot be done instantaneously and requires the collation of information from multiple databases. This process takes more than three business days. Strategic email marketing campaigns would be seriously hindered by a three day opt out period necessitating last minute changes.

Third, when co-branded marketing campaigns are conducted, the complexities each company faces are compounded by those of its co-branding partner. Many privacy policies do not allow the sharing of information, so when a company collaborates on a program with an unaffiliated marketing partner, opt-out lists must be sent for processing to a third-party service bureau contracted by the companies involved. The proposed list of potential recipients for the email campaign must be scrubbed against the opt-out list from each company participating in the co-branding effort. After the service company has completed processing the list of eligible recipients, the final list is sent back to the “sender” company, which will originate the co-branded email of behalf of the parties involved. Most service bureaus are contractually obligated to accomplish such list scrubbing within five days. A three day rule would make such co-branded marketing campaigns impossible.

Finally, there is no rationale for the proposed change. The ten day rule has not been abused or shown to be otherwise ineffectual. Those seeking a shorter time frame for opt-out requests have argued that the ten day time frame allows senders to “mail-bomb” recipients before having to shut off the messages. But, the Commission acknowledges that “[t]hese concerns were not supported by factual evidence that such practices actually occur, or that these practices would be eliminated by a shorter processing period.”³ In fact, the commercial email industry is committed to honoring consumers’ requests not to receive commercial email, and certainly does not want to, or benefit from, sending commercial mail to recipients who do not want to receive such messages. A three day requirement would cause many well-intentioned companies to violate the Act, without offering any additional benefit to consumers or deterring bad actors. Many small businesses – some which may maintain email lists manually – will be disproportionately burdened. Those bad actors who wish to violate the Act will not adhere to either a ten day or three day rule, whereas legitimate companies may elect to forgo offering their services via email entirely rather than risk non-compliance. Congress did not contemplate this result, but sought to limit emails by unscrupulous marketers.

³ NPRM25443

III. The Commission Should Clarify That “Forward-to-a-Friend” Email Is Exempt from the Act When No Consideration is Given

Currently CAN SPAM is silent as to whether the Act applies where either a person receives a commercial email message and forwards the message to another person, or a person visits a webpage and sends a link or a copy of the webpage to another person. The NPRM addresses two “forward-to-a-friend” scenarios: those involving consideration and those without consideration where forwarding is merely “encouraged.” With regard to the latter, the Commission has asserted that when an email contains language encouraging the recipient to forward the email to others, and the email includes a forwarding mechanism, the encouraging language constitutes inducement, and the email originator becomes a sender under the Act. NetCoalition strongly opposes this interpretation as overbroad, inconsistent with the intent of the Act, and onerous to enforce.

NetCoalition accepts the Commission’s interpretation that where there is payment or other consideration to procure the forwarding of a commercial message, that message may properly be subject to the Act. However, NetCoalition does not believe the Act is intended to cover messages that are forwarded absent any form of consideration. We acknowledge and agree with the Commission’s position that merely making available the means for forwarding a message, such as a “click-here-to-forward” mechanism, would not rise to the level of inducement. Instead, properly, such conduct would fall within the ambit of “routine conveyance,” or “the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.” However, it is improperly overbroad to view any content that could be considered “encouragement” as sufficient “inducement” to constitute “procurement” that triggers compliance with the Act.

Under the analysis suggested by the NPRM, *any* express encouragement would constitute the procurement of the forwarding of a message, subjecting it to the Act. This position is far too encompassing. For example, under the proposed interpretation, an email that includes language in a digital camera ad such as “Don’t let your friends miss out on this deal,” or, for a cellular phone, “Tell a friend and you can talk to each other!” would be subject to the Act. This is an inappropriate extension of the Rule. Mere encouragement is not the same as inducement. Trying to draw the line of what constitutes encouragement also creates uncertainty that can be voided by reliance on the clear and objective standard of consideration. To provide guidance to companies while not over-regulating “forward-to-a-friend” campaigns, the Commission should eliminate the subjectivity injected into the Rule from reliance on “encouragement.” The Commission should clarify that where there is any form of consideration, a “forward-to-a-friend” message is subject to the Act, but where an email merely contains a mechanism to forward the email, or promotes classic “word of mouth” encouragement absent consideration, it is not subject to the Act.

In addition to being overbroad, the proposed interpretation of “procure” is technically problematic from an enforcement perspective. For example, how would an original sender in a “forward-to-a-friend” campaign comply with downstream opt-out requests? While a company can suppress email it sends directly, it would be impossible for a company to prevent one recipient from forwarding it to a friend, who may have requested opt-out. To require this would require the company to anticipate and intercede in the actions of a private actor. Moreover, it is also impossible to ensure that the forwarding party will not improperly alter an original message. Where a sender may have circulated an email that complied with the Act, a recipient can forward an altered or truncated version that may have been rendered non-compliant by the edits of the forwarding party. For example, in forwarding a message, the original recipient could delete the required opt-out mechanism or the valid physical postal address. It would be inappropriately strict to impose liability on the original sender in this scenario, and would ultimately cause many well-intentioned companies to be non-compliant, or would completely chill companies from undertaking “forward-to-a-friend” campaigns.

Despite the Commission’s efforts to create practical and clear rules, as proposed, there is no clear way to comply with the “forward-to a-friend” provisions other than complete cessation of such campaigns. This was not the intent of Congress. Instead, the Commission should instead clarify that “forward-to-a friend” campaigns are not covered by the Act unless clear consideration is offered.

IV. The Commission Should Clarify That Messages Sent Pursuant to a Relationship Formed Without Consideration Is A Commercial Transaction Under Section 7702(17)(A)(i)

In the NPRM, the Commission considered the question of whether consideration was required for a “commercial transaction” under Section 7702(17)(A)(i), which exempts as transactional or relationship “messages to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.” In considering this question, the Commission concluded that it was unnecessary to interpret Section 7702(17)(A)(i) as petitioned because the types of email messages that promoted concern would be deemed transactional or relationship messages under Section 7702(17)(A)(v), which exempts messages “to deliver goods or services . . . that the recipient is entitled to receive under the terms of a transaction.” NetCoalition respectfully submits that the Commission’s conclusion is not broad enough, and it is necessary to clarify that consideration is not required to constitute a “commercial transaction” under Section 7702(17)(A)(i) to properly capture all transactional and relationship emails.

While the Commission is correct that some transactional and relationship email messages will fit under the exemption in Section 7702(17)(A)(v), that definition does not capture other important transactional or relationship emails. For example, if a person subscribes to a service, confirmation or completion emails would not necessarily be part of the goods or services the recipient is “entitled to receive.” Where a user signs up for a free Internet greeting card service, the service the user is entitled to receive is the ability to send e-cards. An email confirming the user’s enrollment and notifying the user of her

password would be outside the definition of Section 7702(17)(A)(v), but would properly be within the scope of Section 7702(17)(A)(i), and is clearly relationship or transactional in nature. Free subscription and membership to online services is beneficial to both users and service providers because it offers some ability to control and police the online environments. These free Internet services are popular with consumers, and clearly create a transaction. It should be clarified that “commercial transaction” under Section 7702(17)(A)(i) includes transactions where no consideration is exchanged. Failure to take this position would encourage more online businesses to charge for their services and deprive consumers of valuable free services. NetCoalition urges the Commission to clarify that a “commercial transaction” does not require consideration.

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Thank you for providing NetCoalition with this opportunity to comment on the proposed in the NPRM. NetCoalition prides itself on diligent and complete compliance with all provisions of CAN SPAM, and encourages the Commission to carefully consider the practical analysis of the NPRM contained in these comments. We look forward to working with the Commission to craft a Rule that reasonably implements the intent of the Act, but also provides clarity and greater guidance to the industry on the scope and applicability of CAN SPAM.

Sincerely,

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General Counsel